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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 494

JACOB SCHOEPS, PETITIONER

v.

WILLIAM A. CARMICHAEL, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, LOS ANGELES, CALIFORNIA, DISTRICT NO. 16

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion (R. 62-80) and concurring opinion (R. 80-82) in the Court of Appeals are reported at 177 F. 2d 391. The findings of fact and conclusions of law of the District Court (R. 39-45) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1949 (R. 82-83). The petition for a writ of certiorari was filed on December

22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, under Section 19(a) of the Immigration Act of February 5, 1917, petitioner, an alien who has resided in the United States since 1911, made an entry into the United States in 1939 when he returned after a voluntary absence of several hours in Mexico, and whether, under that section, he is deportable on the basis of his having thereafter admitted the commission in New York in 1921 or 1923 of a crime involving moral turpitude.

STATUTE INVOLVED

Section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 874, 889, as amended by Sec. 20 of the Act of June 28, 1940, 54 Stat. 671, and by Reorganization Plan No. V, 54 Stat. 1238 8 U.S.C. 155(a), provides in relevant part:

> * * * except as hereinafter provided, any alien who is hereafter [after May 1, 1917] sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misde-

meanor involving moral turpitude; * * * shall upon the warrant of the Attorney General, be taken into custody and deported. * * * the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment. * * * the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: * * *.

STATEMENT

Petitioner, a native of Germany, arrived in the United States on February 17, 1911 (Ex. 5).[1] He never became a citizen of this country. In March 1943, he was arrested in Los Angeles, California, charged with committing a sex offense upon a three-year old girl (Ex. 2, p. 5). He was interrogated

[1] The exhibits referred to are contained in the original record of the deportation proceeding which was introduced and made part of the record in the District Court (R. 23-24, 48-50). This original record is not reproduced in the printed record but is on file with the Clerk of this Court.

under oath by an immigration inspector, James R. Busselle, on March 10 and March 12, 1943 (Exs. 2, 3). Petitioner told the inspector in detail what he had done to the child and, upon the latter's inquiry, stated that he had committed a similar offense in New York upon a seven-year old girl named Lena Stench (Ex. 2, pp. 5-6). The date of the latter offense was fixed at approximately the year 1921 (Ex. 3, p. 3). Petitioner also stated that on Thanksgiving Day, 1939, he went to Tiajuana, Mexico, to see the races and returned to the United States four hours later (Ex. 2, p. 4). These statements were reduced to writing and petitioner signed them (Exs. 2, 3).

Beginning on June 8, 1943, hearings were held before a presiding inspector of the Immigration and Naturalization Service pursuant to a warrant of arrest charging that petitioner had been found in the United States in violation of the immigration laws in that he admitted having committed a crime involving moral turpitude prior to his entry into the United States, "to wit, he being over the age of 18 years indulged in indecent and immoral practices with the sexual parts or organs of a child under the age of 10 years" (R. 3). Further hearings were held on June 12, July 17, and August 6, 1943, at which petitioner was represented by counsel (*ibid.*). In the course of these hearings, petitioner denied that he had entered the United States on Thanksgiving Day, 1939, but admitted that he had made the statements of March

10 and March 12, 1943, to inspector Busselle (R. 6). When confronted with his signed statements and asked whether he had made them, respondent remained mute upon advice of counsel (R. 13-15). He denied that he had ever been arrested in connection with his offense against Lena Stench, but failed to deny that he had committed the offense (R. 9-10).

On April 10, 1944, a warrant of deportation was issued directing petitioner's deportation to Germany (R. 22-23). On January 20, 1948, after a series of delays due in part to petitioner's disabilities resulting from an accident (see R. 17), he was taken into custody under this warrant (R. 21).

On the same date, petitioner filed a petition for a writ of habeas corpus in the District Court for the Southern District of California (R. 2-18). The writ issued (R. 19-20), respondent filed a return (R. 21-22), and, after hearings, the District Court made findings of fact, among others, that petitioner last entered the United States on or about Thanksgiving Day, 1939, after a temporary absence in Mexico, and that he had voluntarily admitted the commission of an offense involving moral turpitude in New York City in 1923,[2] in

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[2] The difference between this date and the 1921 date given by petitioner (*supra*, p. 4) has no significance. As we point out (*infra*, pp. 6-7), the act which he admitted was a crime under a New York law which was enacted over half a century ago and has been continuously since then and is still in effect.

violation of Section 483a of the New York Penal Code (R. 40). The court held, in its conclusions of law, that the issuance of the warrant of deportation was due and regular and not arbitrary or capricious, and that the decision to issue it was supported by substantial evidence (R. 44-45). Accordingly, the writ of habeas corpus was discharged and dismissed (R. 46-47), and the order was affirmed by the Court of Appeals for the Ninth Circuit (R. 83).

ARGUMENT

1. Petitioner's contention, made here for the first time (see Pet. 7), that the act of moral turpitude upon which his deportation was predicated was not a crime under New York law at the time of its commission and, consequently, could not be the basis of deportation (Pet. 11-13), involves a twofold error. He correctly states (Pet. 12) that Section 483a of the New York Penal Laws was not enacted until 1927. Consequently, the reference to it by the Immigration and Naturalization Service and the courts below as the section violated by petitioner's admitted offense was mistaken. But, on the other hand, petitioner is himself incorrect in assuming therefore that his act was not a crime under New York law.

Section 483 of the New York Penal Laws was enacted by the Laws of 1881, Chap. 676, Sec. 289, and amended by the Laws of 1888, Chap. 145, Sec. 5. Continuously in effect since then, it provides:

A person who:

1. Wilfully causes or permits the life or limb of any child actually or apparently under the age of sixteen years to be endangered, or its health to be injured, or its morals to become depraved; or

2. Wilfully causes or permits such child to be placed in such a situation or to engage in such an occupation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired,

Is guilty of a misdemeanor.

The courts of New York have repeatedly held that acts such as those committed by petitioner are violations of Section 483. *People* v. *Gibson*, 232 N.Y. 458, 462, 134 N.E. 531; *People* v. *Onody*, 296 N.Y. 305, 73 N.E. 2d 35; *People* v. *Trenkle*, 169 Misc. 687, 9 N.Y. Supp. 2d 661; *People* v. *Donohue*, 114 App. Div. 830, 100 N.Y. Supp. 202. Petitioner's offense, notwithstanding that it was erroneously termed a violation of Section 483a, was a crime under Section 483. And there can be no doubt, nor does petitioner deny, that it involved moral turpitude. *Ng Sui Wing* v. *United States*, 46 F. 2d 755 (C.A. 7).

2. As we understand his second contention (Pet. 13-16), petitioner would assimilate into a deportation proceeding based upon an admission of the commission of a crime prior to entry, the rule of the criminal law that a conviction cannot be had upon a confession alone not corroborated by in-

dependent evidence of the *corpus delicti*. The short and conclusive answer to this contention is that Congress has expressly declared that an alien who makes such an admission shall be deported. And, of course, "The power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question." *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425. Petitioner's argument goes to the wisdom and policy of the statute and should more properly be addressed to the Congress.

So far as this contention is concerned, the only issue in the deportation proceeding was whether petitioner had in fact admitted that he had committed a crime involving moral turpitude prior to his entry in 1939.[3] We do not understand that petitioner contends there was no sufficient evidence of such an admission. The fact is that petitioner did more than merely make the admission to inspector Busselle, as was shown at the hearing. At the hearing itself, when he was represented by counsel, he denied having been arrested for the New York crime but not that he had committed it. Confronted with his signed statements, he chose to stand mute. There was no impropriety in considering these statements as evidence, *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, 357, and peti-

[3] Petitioner's challenge is limited solely to the admission of the crime and is not directed to the admission of his entry in 1939.

tioner's silence with respect to them was an admission, *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103; cf. *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, this time made at the very hearing held to determine the facts relating to his deportability.

3. The *Volpe* decision of this Court, *supra,* forecloses petitioner's contention (Pet. 16-20) that the provision of the statute for deportation upon admission of the commission of a crime prior to entry applies only where the crime was committed outside the United States. In the *Volpe* case, decided in 1933, the Court resolved an existing conflict in the lower courts as to the applicability of this provision to crimes committed in the United States and held that conviction of a resident alien of a crime committed in this country prior to a new entry renders him deportable. Petitioner argues, however, that there is a distinction in this regard between an admission of the commission of a crime and a conviction, but we perceive no basis for such a distinction. The statutory language is:

> * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall * * * be * * * deported.

The phrase "prior to entry" qualifies both the preceding clauses and shows that Congress was concerned with the fact of the crime and not with

the manner in which its commission is established. Congress obviously intended that a man guilty of a crime involving moral turpitude prior to entry should be deported. It follows *a fortiori* from the *Volpe* decision that admission of the commission of a crime within the United States prior to a second or subsequent entry, equally with conviction of such a crime, renders an alien deportable.

Wong Yow v. *Weedin*, 33 F. 2d 377 (C.A. 9), and *Ex parte Keizo Shibata*, 35 F. 2d 636 (C.A. 9), both decided in 1929, upon which petitioner relies in support of this contention, do not avail him. As petitioner's quotations from those decisions (Pet. 17-18) show, the Ninth Circuit thought that the provision for deportation of aliens on account of crimes committed prior to entry applied only where the crimes were committed outside the United States. While those cases involved admissions of crime, other courts of appeals before the *Volpe* decision applied the same rule in cases of convictions of crimes in the United States. *Browne* v. *Zurbrick*, 45 F. 2d 931, 934 (C.A. 6); *United States ex rel. Giacone* v. *Corsi*, 64 F. 2d 18 (C.A. 2). But still other courts had followed the rule later adopted by this Court in the *Volpe* case (*United States ex rel. Medich* v. *Burmaster*, 24 F. 2d 57 (C.A. 8); *Gomes* v. *Tillinghast*, 37 F. 2d 935 (D. Mass.)), as had the Ninth Circuit in two decisions prior to its *Wong Yow* decision, *supra* (*Weedin* v. *Tayokichi Yamada*, 4 F. 2d 455;

Bendel v. *Nagle,* 17 F. 2d 719). These divergent decisions in the lower courts made no distinction between an admission and a conviction of a crime. The controversy concerned the place where it was committed. And it was this conflict which this Court settled in the *Volpe* case (see 289 U. S. at 425, where the Court referred to the Seventh Circuit's opinion under review, 62 F. 2d 808, for the citations of the earlier conflicting decisions).

4. Similarly, the *Volpe* case is conclusive of petitioner's final contention that his "re-entry" following an absence of only several hours was not an "entry" within the meaning of the statute (Pet. 20-22). Petitioner expressly disavows any intention to attempt to distinguish that case or *Lapina* v. *Williams,* 232 U. S. 78; *Lewis* v. *Frick,* 233 U. S. 291; and *United States ex rel. Claussen* v. *Day,* 279 U. S. 398 (Pet. 20-21), nor apparently does he rely upon *Delgadillo* v. *Carmichael,* 332 U. S. 388, which is, in any event, readily distinguishable from the others.[4] His argument, rather, is that—

> the rule that "entry" in Section 19(a) means "re-entry" of an alien who is lawfully here for permanent residence and who never relinquished that residence is an unreasonable and unwarranted construction of that section and not required nor sanctioned by it. [Pet. 21.]

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[4] It held that an alien seaman whose ship was sunk and wrecked while on an intercoastal voyage during the war and who was rescued and taken to Cuba and then returned to the United States, had not thus made a re-entry since his landing at a foreign port was not voluntary but accidental.

But the cases on this point cited above hold to the contrary. There is no doubt that petitioner voluntarily left the United States on Thanksgiving Day, 1939, knowing that he was entering Mexico, a foreign country. Like the alien in the *Volpe* case, his residence in the United States was of long duration. The difference between petitioner's absence for several hours and Volpe's absence for a "few days" (62 F. 2d 808, 809) is not such as to justify different readings of the same statute. And this Court said in the *Volpe* case, 289 U. S. at 425:

> That the second coming of an alien from a foreign country into the United States is an entry within the usual acceptation of that word is clear enough from *Lewis* v. *Frick,* 233 U. S. 291; *Claussen* v. *Day,* 279 U. S. 398.

CONCLUSION

We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY 1950.

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